IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

State Farm Insurance Company,	:	C.A. No. 06-03-0111
	:	
Plaintiff	:	
	:	
vs.	:	
	:	
Boyd's Garage,	:	
	:	
Defendant.	:	

Decision after trial.

Date of Trial: September 15, 2006

Date Decided: September 21, 2006

Judgment for the Defendant.

Jeffrey A. Young, Esquire, Young & McNelis, Post Office Box 1191, Dover, Delaware 19903-1191, Attorney for Plaintiff.

Sandra W. Dean, Esquire, 12322 Willow Grove Road, Camden, Delaware 19934, Attorney for Defendant.

Trader, J.

In this civil action between State Farm Insurance Company (State Farm) and Boyd's Garage, I hold that State Farm has established negligence by a preponderance of the evidence, but that Boyd's Garage is immune from liability to State Farm for the damage to the septic system under 21 Del.C. Sec. 4408. Accordingly, I enter judgment for Boyd's Garage.

The Facts

On May 29, 2005, in the early hours of the morning, Allison Howton lost control of her vehicle on the roadway and went on to the property of Walter and Joan Winazak at 2024 Forrest Avenue, Dover, Delaware. Alonzo Coulbourne, the tenant of the property, operated a business of delivering mulch and stone. Thereafter, the Delaware State Police contacted Boyd's Garage through a dispatcher from Kent-Com and directed that Boyd's Garage remove the vehicle from the Winazak's property. Boyd's Garage had a contract with the State Police for the removal of disabled vehicles. Mr. Lindale, the tow truck driver for Boyd's Garage, went to the scene of the accident and observed a police officer at the scene and a disabled car by a pine tree. There were railroad ties that marked off the area where the septic tank was located and a rock and a piece of plywood was on top of the lid of the septic tank. The tow truck weighs between 15,000 and 19,000 pounds and Mr. Lindale determined that the tow truck might get stuck in the wheat field. The tow truck driver observed the railroad ties, but he did not see the rock on top of the plywood. At the time of the morning the business was not open and he had no information about the owner of the property. Therefore, he could not make any inquiries concerning the railroad ties. When the tow truck drove over the railroad ties, it came over the lid and crushed it causing damage to the septic tank.

It was agreed between the parties that the cost of replacing the damaged septic tank was $6,000.00. State Farm, as a liability insurance carrier for Allison Howton, paid $6,000.00 to the owners of the property for the damage to the septic tank. Pursuant to the policy, State Farm has a contractual right of subrogation against Boyd's Garage.

Boyd's Garage's Immunity from a Negligence Claim

The defendant, Boyd's Garage, contends that it is immune from plaintiff's claims pursuant to 21 Del.C. Sec. 4408. I agree.

Sec. 4408 states as follows:

> No law-enforcement officer or agent or employee of the Department of Safety and Homeland Security, Department of Transportation, State Police or other legally authorized police agency acting under this chapter and no one who tows or stores a vehicle as a result of being directed to do so shall be liable to criminal prosecution arising from such action or be liable to any person for the injury, loss or destruction of any real or personal property which occurs in the course of the removal or storage of any vehicle taken into custody under this chapter.

There are no Delaware cases addressing the application of 21 Del. C Sec. 4408. Additionally, a survey of statutes from all fifty states and the District of Columbia reveals that the statute is unique to Delaware. Finally, the statute was originally passed in 1965 and its legislative history is nonexistent—there is no synopsis of the statute or information concerning the deliberations surrounding its passage. Due to this lack of precedent and legislative history, a resolution of this issue depends exclusively on statutory interpretation.

Both parties also agree that for 21 Del. C Sec. 4408 to apply, the tow truck operator must be acting under the direction of law enforcement. The parties disagree, however, on what the statute means by the phrase "as a result of being directed to do so" by law enforcement. State Farm would limit the phrase to situations "where a police

agency is…directly involved and orchestrating essentially every aspect of the accident scene," whereas Boyd's Garage argues that "being directed" to tow a vehicle by the police occurs at the moment that a tow company is contacted by the police making a request for it to tow a car. This case turns primarily on the issue of what is meant by the statutory term "being directed."

The question of what is meant by "being directed" in 21 Del. C. Sec. 4408 is a question of law for determination by this Court. *See Richardson v. State*, 673 A.2d 144, 145-146 (Del. 1996) (holding that statutory interpretation involves a purely legal question). In contrast, the issue of whether a tow truck has been "directed" to tow a car by a law enforcement agency is generally an issue of fact to be determined by the trier of fact. *Smith v. Isaacs*, 1999 Del. Super. LEXIS 467 at *7 (Del. Super. Sept. 21, 1999) (citations omitted). I am required to establish what the legal definition of "being directed" is under the statute, and I am required to make the necessary factual findings to determine whether a towing company was directed by the state police.

My duty in construing a statute is to give effect to the intent of the legislature as clearly expressed in the language of a statute. *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982). Words not defined in a statute should be given their ordinary and common meaning. *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1245 (Del. 1985). "If the statute as a whole is unambiguous, there is no reasonable doubt as to the meaning of the words used and the Court's role is then limited to an application of the literal meaning of the words." *Id.* at 1246 (citation omitted). "If a statute is reasonably susceptible of different conclusions or interpretations it is ambiguous" and "the Court must rely upon its methods of statutory interpretation and construction to arrive at what the legislature meant." *Id.* (citing 2A Sutherland, Statutes

and Statutory Construction Sec. 45.02 (4th ed. 1984)). "To ascertain the meaning of words in a statute the Court should consider the context and setting thereof, as well as dictionary definitions of words or expressions used therein." *Smith,* 1999 Del. Super. LEXIS 407 at *9 (citing *Hutton v. Phillips*, 70 A.2d 15, 17 (Del. Super. 1949)).

The term "being directed" is not defined by 21 Del. C. Sec. 4408 and, as illustrated by the arguments of the parties, is ambiguous. Applying the above law to the case here supports the conclusion that a towing company is directed to tow a car by the police when the towing company is contacted by the police and asked to tow a car.

An analysis of what the Delaware Supreme Court has termed "the golden rule of statutory interpretation" supports the conclusion that "to direct" is not reserved for situations in which "a police agency is …directly involved and orchestrating essentially every aspect of the accident scene." As stated in *Coastal Barge, supra* at 1247, "[t]he golden rule of statutory interpretation to which we refer is that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result." (citing 2A Sutherland, Statutes and Statutory Construction Sec. 45.12 (4th ed. 1984)). To offer immunity under the statute to those towing companies operating only under the level of supervision from the police required by State Farm's interpretation would render the immunity virtually worthless, because the situation is rare in which the police are exercising that level of control over the towing company.

Finally, a look at the purposes behind sovereign immunity in general, as well as its limits, supports the conclusion that Boyd's Garage should be able to avail itself of the statute. As the Court observed in the context of ruling on the constitutionality of the statute limiting civil liability for county and municipal tort claims, "the continued

provision of local services and the maintenance of fiscal stability are legitimate state interests that support the enactment of an immunizing statute." *Sadler v. New Castle County*, 524 A.2d 18, 25 (Del. Super. 1987). As Boyd's Garage argues, "[t]owing companies would be very unlikely to provide services at the request of the police without protection against lawsuits for simple negligence." While State Farm contends that unless the statute is narrowed to its interpretation it "would essentially give a tow truck operator boundless rights to destroy the property of other innocent individuals and hide under the cloak of a police call," 10 Del. C. Sec. 4001(3) does not extend protection to acts performed with "gross or wanton negligence."

I conclude that "being directed" is not as limited as State Farm defines it. Accordingly, 21 Del. C. Sec. 4408 protects Boyd's Garage from a claim of negligence.

Boyd's Garage is not an Independent Contractor

State Farm contends that Boyd's Garage is an independent contractor. The evidence fails to support this contention. Boyd's Garage has a contract with the State Police wherein it is required to tow disabled vehicles. At the time in question, Boyd's Garage was directed to tow the Howton vehicle. I conclude that Boyd's Garage is an agent of the state police.

Case Law Concerning Recklessness or Gross Negligence

Boyd's Garage correctly argues that "Section 4408 has the effect of extending (in a very limited circumstance) to towing companies the sovereign immunity which the state police enjoy pursuant to the Constitution of Delaware (Article I, Section 9) and pursuant to Title 10, Chapter 40 of the Delaware Code [i.e., "Tort Claims Act"]." Under the State Tort Claims Act, a state employee who acts within the scope of his employment cannot be held personally liable unless gross negligence is established. *Estate of Rae v. Murphy*,

2006 Del. Super. LEXIS 123 at **3-4 (Del. Super. Apr. 19, 2006). When a tow truck driver is directed by the police to remove a vehicle, the driver is essentially acting as a state employee. "The determination of whether a defendant acted negligently and with the requisite intent is typically a question for the jury, but only if a reasonable person could conclude, based on the facts at hand, that the conduct rose to the level of recklessness or gross negligence." *Id.* at *4 (citation omitted).

The Supreme and Superior Courts of this state have defined gross negligence, wanton negligence, and recklessness within the context of the Act. In *Knoll v. Wright*, 544 A.2d 265 (Del. 1988) the Supreme Court held as follows:

> The immunity conferred by the State Tort Claims Act does not extend to conduct accompanied by "gross or wanton negligence." Although the concepts of gross negligence and wanton conduct are not identical, each requires a showing of more than mere inattention or carelessness. Moreover, since the alleged acts of gross negligence and/or recklessness involve errors of judgment, the burden on the plaintiff is a substantial one.

Id. at **3-4. (citations omitted).

In *Browne v. Robb*, 583 A.2d 949, 953 (1990), cert. den., 111 S. Ct 1425 (1991), the Supreme Court explained that "[g]ross negligence is a higher level of negligence representing 'an extreme departure from the ordinary standard of care.'" (citation omitted).

The term wanton conduct was discussed in *Morris v. Blake*, 552 A.2d 844, 847-48 (Del. Super. 1988) as follows:

> To constitute wanton conduct, the behavior must go beyond inadvertence, momentary thoughtlessness, or mere negligence. More importantly, wanton conduct requires behavior which is more egregious than conduct constituting gross negligence…. [The] definition of wanton - a conscious indifference evidencing an 'I-don't-care attitude' - has been applied repeatedly in Delaware jurisprudence.

Id. (citations omitted).

In *Wagner v. Shanks*, 194 A.2d 701, 706-707 (Del. 1963), the Supreme Court observed that "[w]anton conduct occurs when a person, with no intent to cause harm, performs an act so unreasonable and dangerous that he knows or should know that there is an eminent likelihood of harm which can result."

In *Jardel Co. v. Hughes*, 523 A.2d 518, 530-531 (Del. 1987), the Supreme Court analyzed "recklessness" as follows:

> Two significant elements must be present for recklessness to exist. The first is the act itself, *e.g.* in accident cases the negligent operation of a motor vehicle or aircraft…. The second, crucial element involves the actor's state of mind and the issue of foreseeability, or the perception the actor had or should have had of the risk of harm which his conduct would create. The actor's state of mind is thus vital….
>
> Where the claim of recklessness is based on an error of judgment, a form of passive negligence, the plaintiff's burden is substantial. It must be shown that the precise harm which eventuated must have been reasonably apparent but consciously ignored in the formulation of the judgment.

Id. (citation omitted).

The Truck Driver was Neither Reckless nor Grossly Negligent

Applying the law to the facts of this case, I determine that the tow truck driver was neither reckless nor grossly negligent. State Farm has not established that the tow truck operator was consciously aware of a risk of harming the septic tank when he ran over it, or that his conduct represented an extreme departure from the ordinary standard of care. Based on the weight of the tow truck it was not reasonable or prudent to drive the tow truck through the wheat field to the disabled vehicle because Mr. Lindale was concerned that the tow truck would get stuck in the wheat field. Mr. Lindale determined the only safe route to tow the disabled vehicle was to go over the railroad ties. State

Farm has produced no evidence that there was an alternative safe route. At the time of the arrival of the tow truck driver in the early hours of the morning the trucking business was not open and any inquiry to the owner of the business would be fruitless. Neither the tow truck driver nor the police officer at the scene had any information about the owner of the property. Accordingly, no duty is imposed upon the tow truck driver to make inquiries to the owner of the property or owner of the business.

Boyd's Garage was Negligent

Although the tow truck driver was unaware of the existence of the septic tank, he did see the railroad ties. He failed to observe the rock on top of the plywood. The failure to observe what is plainly visible is negligence. He drove his truck over the lid of the septic tank and damaged the lid. The tow truck drive is required to use due care and caution in the operation of the tow truck. The failure to do so constituted negligence. The negligence was the proximate cause of the damage to the septic system. But plaintiff's claim for negligence is barred because of the immunity contained in 21 Del.C. Sec. 4408.

Judgment is therefore entered in behalf of Boyd's Garage and against State Farm Insurance Company for the costs of these proceedings.

IT IS SO ORDERED.

Merrill C. Trader
Judge